

No. 18-3322

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

**LOCAL 702, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS**

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

**CONSOLIDATED COMMUNICATIONS, D/B/A ILLINOIS CONSOLIDATED
TELEPHONE COMPANY**

Intervening Respondent

**BRIEF OF PETITIONER LOCAL 702, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS**

Christopher N. Grant
Schuchat, Cook & Werner
1221 Locust Street, 2nd Floor
St. Louis, MO 63103-2364
Tel: (314) 621-2626
Fax: (314) 621-2378
cng@schuchatcw.com

Counsel for Petitioner

ORAL ARGUMENT REQUESTED

PETITIONER'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 28(a)(1) of the Federal Rules of Appellate Procedure, and to enable the Judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel states that Petitioner International Brotherhood of Electrical Workers, Local 702 is an unincorporated association. It does not have stock. Local 702 is a labor organization and represents employees in the electrical and communications industries in disputes with their employers.

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GLOSSARY OF TERMS

Act or NLRA	National Labor Relations Act
ALJ	Administrative Law Judge
The Board or NLRB	National Labor Relations Board
The Company or the Employer or Consolidated or ICTC	Consolidated Communications d/b/a Illinois Consolidated Telephone Company
Union or Local 702	Local 702, International Brotherhood of Electrical Workers
GC	General Counsel
SA	Separate Appendix to Petitioner's Brief

JURISDICTIONAL STATEMENT

Respondent National Labor Relations Board (“Board”) had subject matter jurisdiction over this action pursuant to 29 U.S.C. § 160. This Court has jurisdiction over this Petition for Review pursuant to 29 U.S.C. § 160(e) and (f). The Board’s Supplemental Decision and Order, 367 NLRB No. 7 (2018), was issued on October 2, 2018 and was a final order. Petitioner Local 702, International Brotherhood of Electrical Workers timely filed its Petition with this Court on October 29, 2018. Local 702 is a party aggrieved by the Board’s Decision and Order and may obtain review in this Circuit because the unfair labor practice in question was alleged to have been engaged in this Circuit (Mattoon, Illinois) and because Local 702 resides and transacts business in this Circuit (based in West Frankfort, Illinois).

STATEMENT OF THE ISSUES

(1) Whether the Board's decision lacks a reasonable basis in the law because the Board impermissibly adopted a *per se* rule that strike-related conduct on a highway is inherently dangerous, to the exclusion of other factors, contrary to the NLRA and case law?

(2) Whether the Board's conclusion that Pat Hudson engaged in misconduct serious enough to lose the protection of the NLRA is supported by substantial evidence in the record when the Board ignored contrary evidence and failed to consider context and apply common sense?

STATEMENT OF THE CASE

A. **Pat Hudson's history at the Company, the Union's strike, and Hudson's termination.**

At the time of the events in question, Pat Hudson had worked for the Company for 39 years. (SA 145.) She was an Office Specialist. (SA 146.) She had a clean work history. (SA 146.)

On December 6, 2012, the Union initiated a strike against the Company, following a breakdown in negotiations. (SA 86 at ¶¶ 2, 18.) Hudson joined the strike and, along with numerous co-workers, picketed various Company locations. (SA 147.)

Following the conclusion of the strike, on December 13, the Company refused to reinstate Hudson. On December 17, at a meeting with her and a Union representative, the Company terminated her for violation of its "handbook/workplace violence" and employee conduct rules. (SA 75.)

Company representatives contended that Hudson had put non-strikers in peril with "extremely dangerous vehicular activity on the strike line and on the public roads" and had trapped company drivers, impeded their progress, and had then "proceeded to follow and torment them" for up to several miles (SA 85.)

The Company based its decision on three alleged incidents – the Greider, Rankin, and Conley incidents. (SA 12.) The Company also

terminated employee Brenda Weaver for the same reasons, alleging that she had acted as a “duo” with Hudson in the same three incidents. (SA 107.)

B. The ALJ’s decision, the original Board decision, and the D.C. Circuit decision on appeal.

Following a five-day trial, during which multiple witnesses testified, the ALJ found that Hudson was discharged in violation of the Act. The Board, in a 3-0 decision (Chairman Pearce and Members Johnson and Schiffer), affirmed. 360 NLRB No. 140 (2014).

With respect to the Greider and Rankin incidents, the ALJ found, and the Board affirmed, that there was “absolutely no misconduct by Hudson.” (SA 12.) On appeal, the Company argued that Hudson had purposely blocked managers Sarah Greider and Kurt Rankin in their cars. The D.C. Circuit disagreed. Record evidence showed that Hudson was driving slowly in front of Greider and Rankin (on a roadway in front of the Company’s Rutledge facility) due to activity and congestion in the road, not as an intentional effort to harass or block them. *Consolidated Communs.*, 837 F.3d 1 (D.C. Cir. 2016).

With respect to the Conley incident, the ALJ and Board similarly found no justification for Hudson’s discharge. (SA 8-9, 12-13.) However, on appeal, the D.C. Circuit held that the Board had misapplied the governing legal standard – first in stressing the “absence of violence” in the incident and

second in holding that “any ambiguity as to whether [misconduct by Hudson] was serious enough to forfeit protection of the Act should be resolved against [Consolidated].” *Consolidated Communs*, 837 F.3d at 18-19. The Court held that the Board had to consider all of the relevant circumstances of the Conley incident. *Id.* The Court also held that the Board improperly shifted the burden of proof and that the General Counsel must prove that misconduct is shielded by the Act. *Id.*

C. The Board’s supplemental decision.

On remand, the Board applied the *Clear Pine Mouldings* test. In a 2-1 decision (Member McFerran dissenting), the Board concluded that Hudson had engaged in misconduct sufficiently severe to lose the protection of the Act. 367 NLRB Bo. 7 (2018). In general, the Board accepted the facts as found by the ALJ (set forth below in greater detail), but reached opposite conclusions. The Board found that Hudson had intentionally moved to block Conley’s truck. (SA 57.) It concluded that Hudson’s actions were calculated to intimidate him and that it was “inherently dangerous” for Hudson to make such moves at highway speeds. (SA 58.) The Board cited statistics on automobile deaths in America and Illinois in support of its decision. (SA 58.)

D. The Conley incident

On the day of the Conley incident, Hudson and Weaver were driving separate cars on the way to the Company’s headquarters where they planned

to picket. (SA 151-152.) At Charleston Avenue, also called Highway 16, Hudson saw by chance a Company truck going east. (SA 152.) The Union had previously advised strikers, including Hudson, about ambulatory picketing and, if they saw any salaried people, to report back to the Union so that picketers could be sent to the job site. (SA 148.) Hudson decided to follow the Company truck to see where it was going. (SA 152, 162.) Weaver did not immediately realize why Hudson had turned right (because Corporate HQ was to the left), but decided to stay with Hudson and followed her. (SA 125, 150, 152.)

Hudson and Weaver followed the Company truck for several miles going east. (SA 154-156.) Manager Troy Conley was driving the Company truck and Lawrence Diggs, a manager from Texas, was in the passenger seat. (SA 57.)

Weaver eventually noticed the Company truck and realized that Hudson was following it. (SA 126.) Around Sarah Bush Hospital, Weaver decided to pass the truck and see who was driving it. She shifted into the passing lane, pulled alongside the truck, recognized Troy Conley, and then, without lingering pulled ahead of the car. (SA 129, 132.)

Hudson waited for several cars to pass and then, by the Hospital or slightly east of it, followed Weaver around the Company truck. (SA 131, 158, 170.) Hudson's intent had been to follow the Company truck; but, when

Weaver passed Conley, she changed her mind. (SA 166-167.) Hudson did not know why Weaver had passed Conley or what Weaver's intentions were, and she did not have a phone to call Weaver and she wanted to stay with Weaver. (SA 147, 157, 167.)

Hudson passed Conley and remained in the left lane alongside Weaver. (SA 180, 187.) According to Conley, Hudson and Weaver then slowed down. (SA 180-181.) He admitted that he may have simply let off his accelerator and did not need to brake. (SA 192.) Both Conley and Diggs admitted that they did not know what speed Hudson and Weaver were driving at this point and that they could have been driving the speed limit. (SA 57, 194, 224, 228.)

Hudson moved into the right lane and several cars behind her passed her. (SA 229.) Conley shifted over to the left lane behind Hudson to see if he could pass too, (SA 181, 197-199); but, as he was doing so, Hudson returned to the left lane. (SA 181, 200, 224, 230.) At that point, they were all moving at highway speed. (SA 57.) Conley had not even begun to pass Weaver's car and there was at least a car length's distance between him and Hudson. (SA 231.) Conley testified that, in his opinion, the distance for Hudson to move into the left lane in front of him was not safe, but, he also admitted that it was possible that Hudson could have thought it was safe and that she could have had her blinker on. (SA 201-203.) Conley stated that he was not close to having an accident. (SA 203.) Diggs admitted there was no danger of

Conley hitting Hudson's car. (SA 231-232.)

Conley returned to the right lane and soon thereafter (no more than one minute later) exited the highway, onto County Road 1200 E, and took an alternative route to the job. (SA 182-183.) Hudson and Weaver could see Conley in their rearview mirrors, but did not try to follow him because it did not appear that he was going to a commercial job and there was not really a way to turn and get back to him. (SA 133, 158-159, 163, 169.)

Following the incident, Conley called his manager, Sam Jurka, to report it. (SA 184-185.) Though the Company had previously given instructions to non-strikers to call the police if they encountered problems during the course of the day, no one called the police to report this incident. (SA 92, 205, 217-218)

In total, with regard to the entire incident, the ALJ found that "Hudson prevented Conley from passing him [sic] by staying in the left lane, for a mile or less and not more than one minute." (SA 8). The ALJ credited Hudson and Weaver that they "did not block Conley in for any significant distance or period of time." (*Id.*) He also found that Hudson did not "cut off" Conley when she moved into the passing lane as he was attempting to pass her and credited Hudson when she testified that she did not do so. (SA 7.)

REQUEST FOR ORAL ARGUMENT

Local 702 submits that oral argument would assist the Court in understanding the facts and law at issue, including a thorough review of the findings of the ALJ and contrary facts ignored by the Board, and a discussion of case law regarding the Board's duty to balance the rights of strikers and non-strikers under the Act and the requirement to consider multiple factors and context in striking that balance.

SUMMARY OF THE ARGUMENT

Pat Hudson, a 39-year office employee with a spotless record, was fired in December 2012 for harassing and intimidating non-strikers by allegedly putting them in peril with “dangerous vehicular activity” and following and tormenting them. Since then, the Board and the D.C. Circuit have found that Hudson engaged in no misconduct in two of three incidents cited for her dismissal. In those incidents, Company managers were wrong on the facts and jumped to conclusions. Nonetheless, ICTC persists in arguing that Hudson committed misconduct in the Conley incident. On remand, the Board mistakenly agreed, finding that Hudson engaged in misconduct in that incident sufficiently severe to forfeit protection of the NLRA.

Local 702 submits the Board’s Supplemental Decision is wrong for two reasons. First, the Board based its conclusions on the inherent dangers of highway driving to the exclusion of other factors. In doing so, the Board created, in effect, a *per se* rule that strike-related conduct on the highway is unprotected. This rule is contrary to the Board’s duty under the Act to balance an employee’s right to picket against a non-striker’s right to be free of intimidation and contrary to case law requiring the Board to consider multiple factors and context in striking this balance. In addition, this rule contravenes common sense. Hudson’s conduct no more intimidates an employee in the exercise of his rights than a truck coerces a driver when the

truck moves into a passing lane and prevents the driver from proceeding as quickly as he wants because the truck stays in the lane. It is a frustrating daily occurrence, not an act of intimidation.

Second, even if the Board did not establish a *per se* rule, the Board's conclusions are not supported by substantial evidence. The Board ignored contrary facts and relied on possibilities. This is not a case of two fairly conflicting views. The Board made baseless conclusions – the exact opposite of the ALJ who lived the case – to defend its result. As found by the ALJ, the position of Hudson's car in the passing lane merely prevented Conley from passing her for one minute and for one mile. Hudson did not cut off Conley; she was driving the speed limit; she did not yell at the non-strikers; and, she did not impede the non-strikers' progress. The Court cannot conscientiously find, on the record as a whole, that Hudson's conduct would reasonably tend to coerce employees in the exercise of their rights.

ARGUMENT

I. The Board's decision creates a *per se* rule that driving on a highway is inherently dangerous, to the exclusion of other circumstances, which is contrary to the Act and precedent.

A. Standard of review.

While the Court gives substantial deference to the NLRB, it still must “determine whether the Board's decision is supported by substantial evidence and whether its legal conclusions have a reasonable basis in law.” *Columbia*

Coll. Chi. v. NLRB, 847 F.3d 547, 552 (7th Cir. 2017) (citations omitted). The Court defers to the Board's interpretation of the NLRA unless its legal conclusions are irrational or inconsistent with the Act. *Id.* Where the matter involves analysis for which the Board has no special expertise, however, the Court's review is *de novo*. *Roundy's Inc. v. NLRB*, 674 F.3d 638, 646 (7th Cir. 2012) (citing *NLRB v. Americare-New Lexington Health Care*, 124 F.3d 753, 757 (6th Cir. 1997) ("[C]ourts do not defer to the Board when it decides a legal question beyond its expertise.")).

Courts may refuse enforcement of Board orders where they have no reasonable basis in law, “either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). If the Board chooses to “apply a standard that conflicts with this Court's precedents,” the Board’s legal conclusions are due no deference. *Columbia Coll. Chi.*, 847 F.3d at 552. *See also Bob Evans Farms v. NLRB*, 163 F.3d 1012, 1020 (7th Cir. 1998) (Board’s reading of Act is contrary to case law and is due no deference).

B. The Board established a *per se* rule that highway driving is inherently dangerous to the exclusion of other factors.

Here, the Board established a *per se* rule that highway driving is inherently dangerous to the exclusion of other factors. The Board found that

“[i]t is readily apparent that Hudson’s driving would reasonably cause Conley and Diggs to fear for their safety.” (SA 57.) The Board majority speculates that any employee would reasonably fear that “Hudson’s next maneuver could cause a collision that would jeopardize their lives or the lives of other motorists on the highway.” (*Id.*) Moreover, the Board states that “it is inherently dangerous to make such move at highway speeds in the presence of other vehicles and to obstruct or impede their progress.” (*Id.*) The Board explicitly discounts contrary record evidence, writing in a footnote that, “It does not matter that Hudson was driving within legal speed limits and that Conley may have sought to exceed those limits in attempting to pass.” (SA 58.) Instead, the Board cites statistics about deaths on roadways that include few specifics and, when viewed on the cited websites, lump information about deaths by drunk drivers and speeding with other deaths. (*Id.*)

A *per se* rule is a “generalized rule applied without consideration for specific circumstances.” Merriam-Webster, Legal Definition of “per se rule,” <https://www.merriam-webster.com/legal/per%20se%20rule> (last visited on Feb. 1, 2019). This is what the Board established in this case. The Board elevates speculation about the inherent dangers of highways, without considering contrary evidence, to produce a result that trumps the right to picket. Under the Board’s view, the mere fact that a striker moves in front of a non-striker’s vehicle, preventing him from passing for no more than one

minute, causes the striker to lose the protection of the Act, even if the striker is driving the speed limit and possibly used her blinker, even if the striker keeps at least a car's length in front of the non-striker, even if the striker is not seeking to distract the non-striker, even if the striker does not come close to causing an accident, and even if the striker has driven in front of the non-striker for innocuous reasons. It also makes no difference that the non-striker was speeding. All that matters is that the striker could possibly cause an accident due to the inherent dangers of driving – one car moving in front of another – on the highway.

C. The Board may not establish *per se* rules that are inconsistent with the NLRA and case law.

Federal courts have repeatedly rejected the Board's imposition of *per se* rules. The leading case is *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667 (1961), where the Board had ruled that a union hiring hall was *per se* unlawful. The Supreme Court noted that Congress had not expressly banned hiring halls in enacting the NLRA, but only certain discriminatory practices under them. *Id.* at 674. The Court held that the Board could not go further than the Act and establish a more pervasive regulatory scheme – completely banning union hiring halls instead of just discriminatory practices under them – by creating a *per se* rule. *Id.* at 675.

Courts of Appeals have followed the Supreme Court in questioning, and in many cases striking down, express and implied *per se* rules created by the Board. In *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1369 (7th Cir. 1983), this Circuit noted that neither Board nor court cases support a *per se* rule that merely asking an employee a question about union affiliation has a natural tendency to discourage him from supporting a union. More pointedly, in *California Acrylic Indus. v. NLRB*, 150 F.3d 1095 (9th Cir. 1998), the Ninth Circuit held that the Board had, in effect, adopted a *per se* rule when it had found that a strike was based on an employer's unfair labor practices when a union representative had made statements about the employer's unlawful surveillance to employees before a strike vote. *Id.* at 1101. The Court characterized the Board's ruling as mechanical, placing form over substance. It also noted that the Board's rule invited manipulation. The proper inquiry, the Court held, is to consider "all the circumstances of the case," *id.* at 1101, which the Board had failed to do in discounting contrary record evidence that the strike at issue was, in fact, motivated by economic concerns not unfair labor practices, *id.* at 1102.

The problem with *per se* rules is that they gloss over the tensions between employee rights and employer prerogatives as written into the Act and recognized by Board and court precedent. *Per se* rules also defy common sense. They avoid contrary facts and context, which are important in

deciding whether the law has been violated. In adopting a *per se* rule, the Board injects a fixed rule into a complex situation that, by law and policy, requires the Board to strike a tactful balance. *See Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 721 (D.C. Cir. 1981) (*per se* rule that an employer is barred by Section 8(a)(1) from using discipline to obtain information from an employee concerning a matter that has been set for arbitration impermissibly interferes with the manner in which parties in a collective bargaining relationship structure the arbitration process); *see also Furniture Rentors of Am. v. NLRB*, 36 F.3d 1240, 1247-1248 (3d Cir. 1994) (the court may not give "rubber stamp" approval to the Board's "virtual *per se* rule" that subcontracting decisions be the subject of bargaining if the rule is "inconsistent with a statutory mandate or ... frustrates the congressional policy underlying [the NLRA]."); *NLRB v. A & T Mfg. Co.*, 738 F.2d 148, 151-152 (6th Cir. 1984) (the Board "in effect has established a *per se* rule" that, once an employer decides to discharge an employee for an illegal reason, it is impossible to adopt an additional legitimate reason; "[t]his *per se* factual rule comports neither with reality nor with the Board's own precedent.").

While not using the term “*per se* rule,” the Seventh Circuit in *Bob Evans Farms v. NLRB*, 163 F.3d 1012 (7th Cir. 1998), faulted the Board for similarly taking a fixed approach and ignoring case law in assessing employee conduct. In the underlying decision, the Board had discounted the

reasonableness of the means of employee protest – a sudden walkout – as a factor in determining whether the employee activity was protected under the Act. The Court noted, though, that federal courts consistently included the means of protest as a factor in the balance of competing claims under the statute – on the one hand, the right to strike and, on the other hand, being disproportionately disruptive. *Id.* at 1020 & 1023-1024. The Board’s argument, the Court explained, is that “the Board selects the ingredients that make up the balance of competing rights” and the Court’s role is limited to reviewing whether the Board has “followed its own recipe in finding concerted activity to be protected or left unprotected in a given case.” *Id.* at 1020. This, the Court held, is not the law. A finding that concerted activity is protected (or unprotected) must be supported by substantial evidence, and the Board cannot game that finding, and tamper with the evidentiary standard under the Act, by excluding the relevancy of certain factors. *Id.* Ultimately, the Court found the Board’s decision to lack a reasonable basis in the law as it ran counter to the objectives of the Act, to common sense, and to case law. *Id.* at 1022-1023.

D. The Board’s *per se* rule in this case fails to strike a balance between the competing rights of strikers and non-strikers and contravenes the Act and case law.

The Board’s decision here runs counter to the NLRA. The Board has long recognized the right of employees to engage in ambulatory picketing.

Strikers are not limited to patrolling back and forth in front of an entrance. They can follow and track company vehicles to remote job sites for the purpose of picketing there or simply monitoring the employer's business. *International Bhd. of Teamsters, Local 807*, 87 NLRB 502, 506-507 (1949) (union may picket at customer sites where primary employer is working); *see also USW v. NLRB*, 376 U.S. 492, 499 (1964) ("Picketing has traditionally been a major weapon to implement the goals of a strike.").¹ At the same time, the Board has recognized that strikers cannot create dangerous situations that intimidate employees. As set forth in *Clear Pine Mouldings*, strikers "have no right, for example, to threaten those employees who, for whatever reason, have decided to work during a strike, [or] to block access to the employer's premise." 268 NLRB 1044, 1047 (1984). The test is whether a striker's misconduct "would reasonably tend to coerce or intimidate employees in the exercise of Section 7 rights, including the right to refrain from striking." *Id.* at 1046.

It is the Board's duty to strike a balance between the right of employees to strike and picket and the right of non-strikers to refrain from striking.

¹ As found by the D.C. Circuit, it is irrelevant to the right to strike and picket whether a striker is *following* a non-striker's vehicle as opposed to driving *in front* of him. The central question is whether the employee undertakes the conduct for a purpose related to the strike; and, the D.C. Circuit found in this case that Hudson was undertaking her conduct in the Conley incident for such a purpose. *Consolidated Communs.*, 837 F.3d at 17-18 & n. 8.

The Board can and should consider multiple factors and common sense in weighing these competing claims. In this regard, the Board, and the federal courts, have long recognized that during strikes and while picketing, employees sometimes engage in moments of “animal exuberance” and that strikers may temporarily delay non-strikers without losing the protection of the Act. *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941); *Hotel Roanoke*, 293 NLRB 182, 207 (1989); *see also Ornamental Iron Work*, 295 NLRB 473, 479 (1989) (“momentary, otherwise non-coercive blockage will fall within that form of mischief classified as ‘minor acts of misconduct’ which have been in the contemplation of Congress when it provided for right to strike.”); *Consolidated Supply Co.*, 192 NLRB 982, 989 (1971) (affirming ALJ finding that incidents of following of a truck and blocking it momentarily were “the sort of trivial, rough incidents” which are expected during a strike); *compare Kapstone Paper & Packaging Co.*, 366 NLRB No. 63 (2018) (employee actions were unprotected when they blocked truck from leaving premises for 20 minutes).

Following the Board’s duty to weigh competing claims under the Act, federal courts require the Board to consider all of the circumstances in determining whether a striker’s conduct would reasonably tend to coerce or intimidate employees. This was the D.C. Circuit’s instruction on remand. The Court directed the Board to ascertain whether Hudson’s conduct lost the

protection of the Act under “all of the relevant circumstances.” This is also the case law of this Circuit. When assessing whether a statement or conduct tends to coerce employees, this Court has repeatedly considered multiple factors and context. *Great Lakes Warehouse Corp. v. NLRB*, 239 F.3d 886, 890 (7th Cir. 2001) (“We determine whether coercion or interference was present by examining all the relevant facts and circumstances.”); *6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 780 (7th Cir. 2001) (in determining whether activities are forbidden by the Act, “we must look into the circumstances and context in which the statement was made.”). This Court has and will reverse a Board finding that certain conduct has a tendency to intimidate employees when the Board has failed to properly consider all of the circumstances, including context and common sense. *See NLRB v. Champion Lab.*, 99 F.3d 223, 227-228 (7th Cir. 1996) (“We have long recognized that ‘it would be untenable, as well as an insulting reflection on the American worker's courage and character, to assume that any question put to a worker by his supervisor about unions, whatever its nature and whatever the circumstances, has a tendency to intimidate, and thus to interfere with concerted activities in violation of section 8(a)(1).’ Given the circumstances, we think that Smith's question is one which a reasonable worker would, like Benskin, handle with aplomb.”) (citation omitted).

Here, in fixating on the inherent dangers of highway driving and traffic fatalities, instead of whether Hudson in fact posed a danger, the Board has abandoned its statutory duty to weigh competing claims by assessing all of the relevant circumstances. It runs counter to the objectives of the Act to turn a brief encounter on a highway into a dischargeable offense based on fears of what could happen (but did not happen) and statistics on traffic fatalities in the abstract. The Board's reliance on inherent dangers, to the exclusion of other factors and what actually happened, guts the right of employees to engage in ambulatory picketing. It holds striking employees hostage to the flow of traffic, to the subjective fears of others, and to how fast a non-striker wishes to drive.

The Board's finding defies common sense. The incident here, where one driver is in front of another, at the speed limit, for no more than one mile and no more than one minute, happens hundreds if not thousands of times per day. Who has not been "blocked" by a truck or car that moved in front of them on the highway? Who hasn't felt frustrated that they could not pass a truck or car that is driving slower than they would like to drive? This is a daily occurrence. Most of us, including American workers, can handle such situations with "aplomb." *Champion Lab.*, 99 F.3d at 228.

The Board's decision is also contrary to other strike misconduct cases involving driving. The Board and the courts recognize a difference between

purposeful driving that puts a non-striker in danger and everyday driving. For example, in *Consolidated Supply*, 192 NLRB 982 (1971), the Board found that a striker, who followed a non-striker's truck and then "got ahead of the truck and slowed down, forcing the [non-striker] also to drive slowly," did not lose the protection of the Act. The Board held that such incidents are "the sort of trivial, rough incidents which are to be expected during a long, contested strike." *Id.* at 989. *See also Altorfer Machinery Co.*, 332 NLRB 130, 144 (2000) (striker did not engage in misconduct where testimony was limited to general assertions that "the green truck stayed behind me most of the time" but the driver never drove so close to the non-striker as to be regarded as "tailgating"); *Batesville Casket Co.*, 303 NLRB 578 (1991) (striker did not engage in misconduct when he pulled alongside a company van at a stop light, deliberately pulled in front of him, and continued in this position for a short period of time).

The Board's decision departs from this precedent in establishing a *per se* rule about highway driving. The earlier Board cases look at context and the circumstances to determine whether the conduct would reasonably tend to coerce or intimidate employees. The Board does not simply conclude that driving is unprotected based on the possibility of an accident, or the inherent dangers of moving into a passing lane, or statistics about unrelated traffic deaths. Certainly, the Board's opinion on highway driving, in relation to its

interpretation of the Act, is due no deference. The Board's expertise is in labor-management relations, not in playing traffic cop.

The Supplemental Decision cites *Oneita Knitting Mills, Inc. v., NLRB*, 375 F.2d 385 (4th Cir. 1967), but the Board's reliance on that case is misplaced. The facts there were different. The strikers repeatedly drove their car in front of the non-striker's car and, according to the witness, "crept along and they would turn around and laugh and call me scab." 153 NLRB 51, 62 (1965). By contrast, Hudson did not repeatedly pass Conley's car, did not "creep" in front of Conley's car, and did not shout remarks at him. She drove the speed limit and was in front of Conley one time, for about one minute. Moreover, nothing in the Fourth Circuit decision suggests that the Board can and should focus on the inherent dangers of driving in front of a non-striker to the exclusion of other factors. The Fourth Circuit concluded that the strikers' conduct in that case was inherently dangerous in that it involved the obstruction of a highway – i.e., the repeated "creeping" found by the ALJ. The court did not say that highway speed driving, where a striker prevents a non-striker from passing for one minute, is inherently dangerous.

This case is like the Seventh Circuit's *Bob Evans Farms* case. There, like here, the Board failed to properly weigh competing claims and failed to consider important factors in assessing whether employee activity was protected or not. While in that case the Board excluded a relevant factor

from its determination, whereas here the Board has focused on one factor to the exclusion of others, the result is the same – the Board believes it alone selects the “ingredients” that make up the balance of competing rights. This is wrong. The Board’s decision is contrary to the objectives of the Act, case law, and common sense, and its reading of the Act, making the inherent dangers of highway driving to the exclusion of other factors, does not withstand rational scrutiny.

II. The Board’s decision that Pat Hudson engaged in serious strike misconduct is not supported by substantial evidence in that the Board ignored contrary evidence and relied on unsupported conclusions.

A. Standard of review

The Court will sustain the Board's factual findings if the record as a whole provides substantial evidence to support them. 29 U.S.C. § 160(e) & (f); Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1214 (7th Cir. 1996) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). A court may not reject the Board's "choice between two fairly conflicting views," but a court may set aside the Board's decision when the court cannot "conscientiously find that the evidence supporting that decision is substantial when viewed in the light that the record entirely furnishes,

including the body of evidence opposed to the Board's view." *Weather Shield Mfg., Inc., Millwork Div. v. NLRB*, 890 F.2d 52, 57 (7th Cir. 1989) (citing *Universal Camera Corp.*, 340 U.S. at 485).

The Board's application of the law to particular facts is reviewed under the same substantial evidence standard. *Winnebago Television Corp.*, 75 F.3d at 1212. A court will defer to the Board's application of the law in recognition of "the Board's special function of applying the general provisions of the Act to the complexities of industrial life." *Champion Lab.*, 99 F.3d at 227 (citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)). That said, the Court owes no deference to the Board in matters that do not involve its special expertise. *Roundy's Inc.*, 674 F.3d at 646 (citations omitted).

The standard of review is not modified where, as here, the Board does not accept the ALJ's findings, but "the evidence supporting the Board's conclusion may be viewed as less substantial than it would be if the Board and the ALJ had reached the same conclusion." *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1475-1476 (citing *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1186 (7th Cir. 1990)). The "derivative inferences" reached by the ALJ – ones drawn from the evidentiary facts themselves – are important to review by a court of appeals and are part of the record before a reviewing court. As such, they necessarily contribute to the amount of evidence weighed against that supporting the Board in the determination whether the

NLRB decision is supported by substantial evidence. *Kopack v. NLRB*, 668 F.2d 946, 954 (7th Cir. 1982).

B. The Board’s decision that Pat Hudson lost the protection of the Act is not supported by substantial evidence.

At this point, there is no great dispute as to facts in this case. The Board on remand essentially adopted the ALJ’s findings – where the Board changed course, this time around, was in drawing the exact opposite conclusions from the facts as the ALJ.

There is also no dispute as to the legal test to apply. The D.C. Circuit instructed the Board to apply the analysis in *Clear Pine Mouldings*: whether, consistent with precedent and “all of the relevant circumstances,” Hudson’s conduct involving Conley “reasonably tended to intimidate or coerce any non-strikers.” This test is an objective test. While violence or its absence can be factors, the Board must also evaluate the objective impact on a reasonable non-striker of misconduct committed on a highway with third party vehicles present. *Consolidated Communs.*, 837 F.3d at 18. As the Seventh Circuit has held in determining whether certain misconduct warrants the sanction of discharge, “trivial rough incidents or moments of animal exuberance must be distinguished from misconduct so violent or of such serious character as to render the employee unfit for further service.” *Temp Tech Industries, Inc. v. NLRB*, 756 F.2d 586, 590 (7th Cir. 1985.) (citing *Advance Industries Div.-*

Overhead Door Corp. v. NLRB, 540 F.2d 878, 882 (7th Cir. 1976)). Strike misconduct becomes serious if it reasonably tends to coerce or intimidate.

Richmond Recording Corp. v. NLRB, 836 F.2d 289, 295 (7th Cir. 1987).

Petitioner's first argument is that the Board impermissibly created and applied a *per se* rule in this case. But, even if not, the Court should reverse the Board based on the record. This is not simply a matter of two conflicting views. Rather, when looking at all the evidence, the Court cannot conscientiously find substantial evidence supporting the Board's decision.

As noted above, the Court "must look into the circumstances and context" in which misconduct occurred. *6 West Ltd. Corp.*, 237 F.3d at 780. The Court should consider such factors as the nature, duration and purpose of the incident, whether the conduct was repeated, and the setting. *Multi-Ad Servs. v. NLRB*, 255 F.3d 363, 371-372 (7th Cir. 2001) (reviewing factors to consider in assessing whether an employer statement would reasonably tend to coerce or intimidate employees). The Court should also consider the effect of the conduct. Of course, the test is an objective test and what matters is not whether an attempt at coercion in fact succeeded. Nonetheless, the Court may look at the issue from the perspective of the employee, and the actual effect of the conduct, "while not determinative, is certainly relevant."

Champion Lab., 99 F.3d at 227 (reversing Board's finding that a supervisor's question to employee about a union meeting would reasonably tend to coerce

employees based in part on the lack of objective evidence that the question had a coercive effect). Finally, the Court should apply common sense. The Board cannot look at an incident in isolation. It needs to view it in the context of the real world. *6 West Ltd. Corp.*, 237 F.3d at 778-779 (chastising the Board’s decision-making as “divorced from the real world” and an example of skewed and position-oriented decision-making “without well-reasoned application of the NLRA, precedent and common sense”); *Champion Lab.*, 99 F.3d at 228 (single off-handed remark in context of bantering among workers does not constitute a threat); *see also Universal Truss, Inc.*, 348 NLRB 733, 735 (2006) (in determining whether specific misconduct is serious enough to warrant discharge, it is appropriate to consider surrounding circumstances and context).

The record evidence in this case, when viewed in context, makes clear that Hudson did not engage in misconduct. The Conley incident was brief. It was one time and not repeated. At worst, the position of Hudson's car prevented Conley from passing her for one minute. Further, there is no evidence that Conley was in actual danger. Hudson did not try to distract him. Hudson was not speeding or creeping or swerving or tailgating. She may have used her blinkers, and the ALJ specifically found that Hudson did not "cut off" Conley and credited Hudson that she did not do so. (SA 7.)

Conley himself admitted that he was not close to having an accident. (SA

201-203.) There was also no real impediment to Conley progressing along the highway. As the Board itself found in its Supplemental Decision, when Hudson first passed Conley she “traveled alongside Weaver at the speed limit;” and when Hudson returned to the left lane and again began driving next to Weaver, they were “all moving at highway speeds.” (SA 57.) Since Hudson was driving around the speed limit, she could not have been obstructing Conley. It is divorced from reality to claim that a non-striker is coercively “blocked” because he cannot break the law and drive faster than the posted speed limit.

The Board failed to consider other important evidence. It makes no mention of the reason that Hudson put herself in front of Conley. Her purpose was not to scare Conley, but to follow and stay with Weaver because Hudson did not know where Weaver was going and did not have a means to communicate with Weaver. (SA 147, 157, 166-167.) There was no premeditated plan to get in front of Conley.

While not dispositive, the objective evidence also shows no coercive effect. Conley admitted at the hearing that he was not close to having an accident. (SA 201-203.) While he testified that he felt the situation was not safe, he also admitted that Hudson may not have felt the situation was unsafe. (SA 201-202.) In addition, neither Conley nor managers called the

police to complain about the incident, notwithstanding specific instructions to call the police if non-strikers encountered problems during the day.

Per the ALJ, Hudson “prevented Conley from passing [her] by staying in the left lane, for a mile or less and not more than one minute.” (SA 8.) Such incidents occur on highways on a daily basis. They can be frustrating, but they do not support a finding of coercion or intimidation in the exercise of rights under the Act. Given the context, that people in the real world are often “blocked” behind a car or truck in a passing lane for one minute, Hudson’s actions were too ambiguous to be coercive. *See Briar Crest Nursing Home*, 333 NLRB 935, 938 (2001) (based on context and surrounding circumstances, statement by striker to non-striker were too ambiguous to be considered a threat).

To avoid the ALJ’s unassailable factual findings, the Board makes baseless assertions to support its decision. The Board majority states that Hudson returned to the left lane, next to Weaver and in front of Conley, “in what could only be an intentional move to block the Company truck.” It also concludes that Hudson’s actions “were calculated to intimidate” and could not possibly be excused. But, the record evidence does not support a finding that Hudson intentionally moved in front of Conley in order to intimidate him or that Hudson intentionally “blocked” Conley at least in any practical sense of that word. When Hudson moved into the passing lane in front of Conley, she

may have had her blinker on and she did not “cut off” Conley. Furthermore, Hudson did not “creep” in front of Conley, or tailgate him, or abruptly brake, or engage in other conduct that would demonstrate an intentional act. There is no record evidence that Hudson was traveling below the speed limit at any time. Nor is there evidence of Hudson yelling profanities at Conley, or trying to distract him, or slowing down as she passed him to stare or give him the “finger” – which could show intent. Nor is there any evidence of strike violence or other acts by Hudson to support the Board’s conclusion. *See Consolidated Communs.*, 837 F.3d at 18 (violence can be a relevant factor); *Briar Crest Nursing Home*, 333 NLRB at 938 (Board may consider surrounding circumstances including the lack of violence). Rather, the opposite – the Board and D.C. Circuit found that Hudson did not engage in misconduct in other incidents.

Put succinctly, this is not a close call. This is not a matter of fairly conflicting views. Rather, the Board relies on conjecture – less than a scintilla of evidence. It is telling that to reach its conclusion, entirely different from that drawn by the ALJ on the facts, the Board must reach outside the record, to the inherent dangers of highway driving and to statistics on traffic deaths. This is not the Board’s area of expertise. It is not the highway patrol. The Court is under no duty to defer to conclusions

unsupported by evidence and based on the Board's speculations about the possibility of an accident on the highway.

As noted in Section I above, Board precedent does not support the Board's decision in this case. The strikers in *Oneita Knitting Mills* repeatedly drove in front of a non-striker and then crept in front of her. 153 NLRB 51, 62 (1965). Hudson did no such thing. Rather, this case is closer to Board precedent finding, at most, a rough incident related to a strike and even that is a stretch because Hudson did not seek to intimidate anyone. *See Altorfer Machinery Co.*, 332 NLRB 130, 144 (2000) (striker did not engage in misconduct where testimony was limited to general assertions that "the green truck stayed behind me most of the time" but the driver never drove so close to the non-striker as to be regarded as "tailgating"); *Batesville Casket Co.*, 303 NLRB 578 (1991) (striker did not engage in misconduct when he pulled alongside a company van at a stop light, deliberately pulled in front of him, and continued in this position for a short period of time).

Finally, Hudson has 39 years of service with the Company and a spotless work record. The ALJ had the opportunity to observe her and other witnesses, including Conley and Diggs, and concluded that Hudson did not forfeit protection of the Act. Of course, the Company originally accused Hudson and discharged her for engaging in two other car-related incidents involving other non-strikers. The Company claimed that she had purposely

trapped and blocked Greider and Rankin in their cars. But, as found by the ALJ, the Board in its original decision, and the D.C. Circuit, those other incidents did not occur as alleged. Instead, the evidence showed during these incidents that Hudson did not intentionally seek to place her car in front of others and was driving slowly because of pedestrians and other activity in the area. That is, Hudson was being safe. Still, the Company persists in arguing that Hudson engaged in intentional misconduct in the Conley incident. The Court should reject this claim, as the D.C. Circuit did with respect to the Greider and Rankin incidents, and reverse the Board's position-oriented approach.

CONCLUSION

For the foregoing reasons, the Union respectfully requests the Court to set aside the Board's Supplemental Decision and Order and find that Pat Hudson did not engage in misconduct sufficiently severe to forfeit the protection of the NLRA.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Union certifies that its brief contains 7,590 words of proportionally spaced, 13-point typeface, using Microsoft Word.

/s/ Christopher N. Grant
Christopher N. Grant
Schuchat, Cook & Werner
1221 Locust Street, 2nd Floor
St. Louis, MO 63103-2364
Tel: (314) 621-2626
Fax: (314) 621-2378
cng@schuchatcw.com

*Counsel for Petitioner,
Local 702, International
Brotherhood of Electrical Workers*

CERTIFICATE RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel for Petitioner certifies that all material required by Circuit Rule 30(a) is included in the Required Short Appendix at the back of the Brief. All material required by Circuit Rule 30(b) is included in Petitioner's Separate Appendix to the Brief.

Respectfully submitted,

SCHUCHAT, COOK & WERNER

/s/ Christopher N. Grant
Christopher N. Grant
1221 Locust Street, 2nd Floor
St. Louis, MO 63103-2364
Tel: (314) 621-2626
Fax: (314) 621-2378
cng@schuchatcw.com

*Counsel for Petitioner,
Local 702, International
Brotherhood of Electrical Workers*

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February 2019, the foregoing was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, which will send notification on all parties.

/s/ Christopher N. Grant
Christopher N. Grant

*Counsel for Petitioner,
Local 702, International
Brotherhood of Electrical Workers*

ATTACHED REQUIRED SHORT APPENDIX

October 2, 2018 NLRB Supplemental Decision and OrderA1

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, DC 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Consolidated Communications d/b/a Illinois Consolidated Telephone Company and Local 702, International Brotherhood of Electrical Workers, AFL-CIO. Cases 14-CA-094626 and 14-CA-101495

October 2, 2018

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

This case is before us on remand from the United States Court of Appeals for the District of Columbia Circuit. On July 3, 2014, the National Labor Relations Board issued a Decision and Order adopting Administrative Law Judge Arthur J. Amchan's decision finding, in part, that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging Patricia Hudson on December 17, 2012, for her strike-related activity. 360 NLRB 1284 (2014). In reaching that conclusion, the Board adopted the judge's finding that Hudson did not engage in misconduct warranting forfeiture of the Act's protection when driving at highway speed proximate to a company truck occupied by two of the Respondent's managers.¹

The Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for review. On September 13, 2016, the court denied enforcement of the Board's Order with respect to Hudson's discharge. *Consolidated Communications Inc. d/b/a Illinois Consolidated Telephone Co. v. NLRB*, 837 F.3d 1 (D.C. Cir. 2016). The court rejected the Board's determination that Hudson's conduct did not lose statutory protection, finding that the Board had erroneously focused exclusively on "the absence of violence." The court described the Board's erroneous reasoning as follows:

The central legal question before the Board was whether Hudson's driving behavior—on a public highway with vehicles traveling at speeds of 45 to 55 mph, and with uninvolved third-party vehicles in the area—"may reasonably tend to coerce or intimidate" Consolidated employees like [nonstriker Troy] Conley and [Lawrence] Diggs. The burden of proof on that question rests squarely on the General Counsel's shoulders. The General Counsel must establish either

that no misconduct occurred, or that the misconduct was not of sufficient severity to forfeit the law's protection of striker activity.

The Board misapplied that standard here. The Board decision stressed the "absence of violence." But that asked the wrong question. The legal test to be applied is straightforwardly whether the striker's conduct, taken in context, "reasonably tended to intimidate or coerce any nonstrikers." While violence or its absence can be relevant factors in that reasonableness analysis, the Board had to take the next analytical step. It had to consider, consistent with precedent, *all* of the relevant circumstances, and evaluate the objective impact on a reasonable non-striker of misconduct committed on a high-speed public roadway with third-party vehicles present.

Id. (emphasis in original) (internal citations omitted).

The court vacated the Board's determination that Hudson's discharge was unlawful and remanded the case for the Board to apply the analysis set forth in *Clear Pine Mouldings*² and to ascertain whether, under "*all* of the relevant circumstances," Hudson's strike-related conduct "reasonably tended to intimidate or coerce any nonstrikers." *Consolidated Communications*, 837 F.3d at 18 (emphasis in original). Consistent with its determination that the General Counsel bears the burden of proof, the court instructed that any ambiguity in the evidence was to be resolved in the Respondent's favor. *Id.* at 19.

On March 10, 2017, the Board notified the parties that it had accepted the remand and invited them to file position statements. The Respondent, the General Counsel, and the Charging Party each filed a position statement.

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the record and the position statements—and after properly examining all of the relevant circumstances and placing the burden of proof on the General Counsel, as directed by the District of Columbia Circuit and required by our precedent—we conclude that Hudson's misconduct was of sufficient severity to lose the Act's protection. Accordingly, we will dismiss the complaint allegation relating to her discharge.

Facts

During a December 2012 strike in support of union bargaining demands, striker Hudson, with fellow striker Brenda Weaver in a separate car behind her, spotted a

¹ Specifically, the judge found that "[i]f [Hudson] engaged in misconduct with regard to Conley, by preventing him from passing her, even if this was for 1-1/2 minutes and for 1-1/2 miles, this conduct was not egregious enough to warrant her termination, particularly in light of the fact

that she was a 39-year employee with no prior disciplinary record." *Id.* at 1295. The Board adopted this finding without comment.

² *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984), enf'd, 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).

company truck travelling on Route 16 in Mattoon, Illinois. Route 16 is a 4-lane divided highway, two lanes in each direction, where the speed limit ranges from 45 to 55 miles per hour. Hudson, with Weaver joining, decided to follow the company truck to see if it would lead to the location of a commercial worksite where the Union could also picket (an “ambulatory picketing” site, in Board parlance). Driving the company truck was Troy Conley, a manager based in Mattoon. Lawrence Diggs, a manager from Texas, was a passenger in the truck. Both were working in the field to cover for strikers.

Once the strikers caught up to the company truck, Weaver used the left lane to pass both Hudson and the company truck and then returned to the right lane in front of the company truck. Hudson then also passed the company truck on the left, but remained in the left lane, travelling alongside Weaver at approximately the speed limit. By driving side by side, Hudson and Weaver prevented any cars from passing. After cars queued up behind Hudson in the left lane, she moved to the right lane in front of Weaver to allow them to pass. Conley, who recognized the strikers when they passed, began to transition into the left lane in an attempt to follow the other cars that had passed the strikers. At that point, with Conley, Weaver, and Hudson all moving at highway speeds, Hudson returned to the left lane and again began driving next to Weaver, in what could only be an intentional move to block the company truck. After braking, Conley returned to the right lane, where he had no choice but to stay behind Hudson and Weaver for approximately one mile until he was able to exit off of Route 16 in order to take a different, longer way to the worksite.

Discussion

The sole issue to be resolved on remand is whether Hudson, in the course of strike-related activity, engaged in misconduct that lost the Act’s protection.³ Nothing in our statute gives a striking employee the right to maneuver a vehicle at high speed on a public highway in order to impede or block the progress of a vehicle driven by a non-striker, even if the maneuver is executed at or below the speed limit. Indeed, the Board has repeatedly held that the conduct of strikers blocking or impeding nonstrikers in vehicles proceeding (presumably at much lesser speeds) into or out of a company entrance is unprotected or, if attributable to a union, unlawfully coercive. There is no apparent

³ The court agreed with the prior Board decision that Hudson was engaged in protected ambulatory strike activity when following the company truck and did not engage in other misconduct of which she had been accused. *Consolidated Communications*, 837 F.3d at 18. Thus, these matters are established as the law of the case. We also do not address the separate issue whether Weaver’s driving behavior went beyond the Act’s protection. In the underlying decision, the Board found that

reason why the result should be different for blocking or impeding nonstrikers on a public highway. In this respect, the court’s remand opinion in this case quoted with approval the Board’s statement in *Clear Pine Mouldings* that “the existence of a ‘strike’ in which some employees elect to voluntarily withhold their services does not in any way privilege those employees to engage in other than peaceful picketing and persuasion. They have no right, for example, to threaten those employees who, for whatever reason, have decided to work during the strike, [or] to block access to the employer’s premises.”⁴

Therefore, even though Hudson’s actions were otherwise protected, the totality of circumstances in this case requires the Board to find that the Act’s protection was lost because of her serious misconduct. Specifically, regarding the “ultimate issue” that governs this case, it is beyond doubt that Hudson’s actions “would reasonably tend to coerce or intimidate employees in the exercise of Section 7 rights, including the right to refrain from striking.”⁵

It is readily apparent that Hudson’s driving would reasonably cause Conley and Diggs to fear for their safety. Two cars, driven at highway speeds by employees participating in a labor dispute with their common employer, passed the company truck and then drove side by side, with Hudson’s car blocking the truck and any other vehicle from properly passing in the left lane. When traffic backed up, Hudson moved over to let other cars pass before deliberately returning to the left lane and blocking Conway’s attempt to pass. By these actions, Hudson sent a clear message to Conley and Diggs that she was intentionally using her vehicle to obstruct or impede their passage. In other words, her actions would not only reasonably be viewed as intimidating, they were *calculated* to intimidate and cannot possibly be excused as some momentary emotional response in the context of a strike’s heightened tensions. Not only was preventing the truck from passing in the wake of other cars dangerous, it would reasonably raise concern about what Hudson might do next. Any employees would reasonably fear that Hudson’s next maneuver could cause a collision that would jeopardize their lives or the lives of other motorists on the highway.

Our finding here is consistent with the Fourth Circuit’s analysis of similar misconduct in *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385 (4th Cir. 1967), where the

Weaver’s discharge violated Sec. 8(a)(3) and (1), 360 NLRB at 1296. As the court noted, the Respondent settled the Weaver allegation with the Union. 837 F.3d at 6 fn. 1. In any event, a determination that Weaver did not engage in serious misconduct would not affect our finding that Hudson did.

⁴ 837 F.3d at 8, quoting from 268 NLRB at 1047.

⁵ *Universal Truss, Inc.*, 348 NLRB 733, 735 (2006).

court reasoned that the Respondent could lawfully deny reinstatement to strikers who slowly drove their car in front of a nonstriker in a manner that prevented her from passing because (1) the misconduct “was calculated to intimidate,” and (2) “obstruction of the public highway” was “inherently dangerous.” *Id.* at 392.⁶ Hudson’s conduct was more egregious than that of the Oneita strikers. Like them, she obstructed the public highway with driving that was calculated to intimidate, but she did so at highway speed and with a maneuver that actually cut off the non-strikers from passing in their truck.⁷ Causing nonstrikers to reasonably fear for their safety is all that is necessary to lose protection under *Clear Pine Mouldings*, and the General Counsel failed to prove Hudson did not do so.

Thankfully, Hudson’s maneuvers did not cause an accident. However, it is inherently dangerous to make such moves at highway speeds in the presence of other vehicles and to obstruct or impede their progress. It is also of no consequence that Hudson’s highway-speed maneuvers and obstruction of the company truck was relatively brief, lasting only a minute or so until Conley chose to avoid continued intimidation by turning onto an alternate route to his destination. In the circumstances presented here, a miscalculation by anyone during that minute—though occurring in an instant—could have caused multiple fatalities or serious injuries.⁸

In 2017, more than 40,000 Americans died on our nation’s roadways,⁹ and more than 1,000 automobile fatalities occurred in Illinois alone.¹⁰ We believe the Board must interpret our Act in light of the public safety interests

at stake here. The protected right to strike does not confer immunity on employees who engage in high-speed maneuvering on public highways in a manner that interferes with other vehicles and puts targeted nonstrikers as well as innocent third-party drivers in fear of becoming a fatality statistic.

ORDER

The complaint allegation that the Respondent unlawfully discharged employee Patricia Hudson is dismissed.

Dated, Washington, D.C. October 2, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Patricia Hudson was a 39-year employee with an unblemished work record when she was fired by her employer for strike-related conduct. Two of the three incidents cited by the employer as lawful grounds for her discharge have now been definitively rejected by the Board and the U.S. Court of Appeals for the District of Columbia Circuit.¹ Left to consider, after the court’s remand of the

⁶ The court discussed this as “the Glisson incident.” It noted that the Oneita strikers involved shouted obscene remarks at the nonstriker driving a car and called her a scab, but in finding the strikers’ conduct unprotected the court relied solely on the fact it “involved obstruction of the public highway.” *Id.*

⁷ It does not matter that Hudson was driving within legal speed limits and that Conley may have sought to exceed those limits in attempting to pass. Sec. 7 does not confer police authority on strikers to enforce traffic laws.

⁸ Cases where the Board has found that employees did not lose the Act’s protection involved much different circumstances than present here. In *Batesville Casket Co.*, 303 NLRB 578 (1991), the judge discredited the manager’s testimony that strikers “boxed in” his company van and instead found that the strikers were merely traveling on the same road, often at a distance from the van, to return to the employer’s facility and “did nothing to impede the progress of the van.” *Id.* at 580. Here, by contrast, Hudson deliberately blocked the company truck with her highway-speed maneuvers. Moreover, simply following nonstrikers at a safe distance, as employees did in *Altorf Machinery Co.*, 332 NLRB 130 (2000), and *MGM Grand Hotel*, 275 NLRB 1015 (1985), plainly does not have a similar objective tendency to intimidate or coerce nonstrikers. *Gibraltar Sprocket Co.*, 241 NLRB 501 (1979)—a case involving strikers following a fast-driving nonstriker and once pulling alongside to motion the nonstriker to pull over—predated the Board’s decision in *Clear Pine Mouldings*, supra, where the Board first adopted the reasonable tendency to coerce or intimidate standard applicable here and

rejected that violence is required to lose protection. As the Board in *Gibraltar Sprocket* was not applying the same standard that we apply here, that decision has no bearing on this case even if it purported to make a finding under all of the circumstances presented there.

There are cases where the Board found more extreme reckless driving unprotected. See *International Paper Co.*, 309 NLRB 31, 36 (1992) (weaving alongside and almost bumping nonstrikers off the road and driving in front in a manner that risked causing a rear-end collision), enfd. sub nom. *Local 14, United Paperworkers International Union v. NLRB*, 4 F.3d 982 (1st Cir. 1993); *Teamsters Local 812 (Pepsi-Cola Newburgh Bottling Co.)*, 304 NLRB 111, 111, 117 (1991) (almost causing an accident by braking in front of a nonstriker); *PRC Recording Co.*, 280 NLRB 615, 663–664 (1986) (braking and zigzagging in front of nonstrikers, causing one to swerve into the median). Nothing in this precedent suggests that anything less reckless would not reasonably tend to intimidate or coerce a targeted nonstriker.

⁹ Adrienne Roberts, *U.S. Road-Death Rates Remain Near 10-Year High*, Wall St. J. (Feb. 15, 2018), <https://www.wsj.com/articles/death-rates-on-u-s-roads-remain-near-10-year-high-1518692401>.

¹⁰ Illinois Department of Transportation, *Illinois Fatal Crash Data for 2017: A Snapshot View*, <http://apps.dot.illinois.gov/FatalCrash/Home/CrashData/2017> (last viewed June 7, 2018).

¹ *Consolidated Communications, Inc. v. NLRB*, 837 F.3d 1, 14–15 (D.C. Cir. 2016) (finding substantial evidence supporting the Board’s conclusion that Hudson did not engage in the misconduct alleged).

case, is a highway-driving incident during which Hudson prevented a manager's company truck from breaking the speed limit to pass her, by staying in the left lane for a mile or less and for not more than 1 minute.²

As framed by the court, the "central legal question before the Board [is] whether Hudson's driving behavior—on a public highway with vehicles traveling at speeds of 45 to 55 mph, and with uninvolved third-party vehicles in the area—'may reasonably tend to coerce or intimidate' ... employees" like those in the manager's truck.³ The burden of proof was on the General Counsel to "establish either that no misconduct occurred, or that the misconduct was not of sufficient severity to forfeit the law's protection of striker activity."⁴ Here, the court explained, the issue is whether Hudson's "conduct, taken in context, 'reasonably tended to intimidate or coerce any nonstrikers,'" and the Board must "consider, consistent with precedent, *all* of the relevant circumstances."⁵

Reversing the administrative law judge, the majority now determines that Hudson's conduct was unprotected. But its conclusion is based on a failure to carefully consider all of the record evidence, as the Board is required to do. Instead, the majority focuses narrowly on the fact that the driving incident took place at highway speeds, adopting what approaches a per se rule that strike-related conduct on the highway is "inherently dangerous" and so always unprotected. While Hudson's conduct may have annoyed or frustrated managers, it never posed any genuine danger to them, and it had no reasonable tendency to intimidate or coerce them.

I.

Hudson's contested conduct arose during a December 6 to December 13, 2012 strike, which occurred after negotiations for a successor collective-bargaining agreement had stalled. On December 10, Hudson and fellow striker Brenda Weaver⁶ were driving separate cars to the employer's headquarters on Route 16 in Mattoon, Illinois, where they planned to picket. Route 16 runs between Mattoon and Charleston, Illinois, and in certain sections widens to a 4-lane divided road lined by businesses and interspersed with traffic lights.

En route to headquarters, Hudson noticed a company truck traveling east on Route 16, away from the Mattoon

facility. Heeding her union's advice that strikers could conduct ambulatory picketing at the Respondent's commercial worksites, Hudson followed the truck to determine if it was going to a location where the union could picket. Weaver, who could not communicate with Hudson, assumed that Hudson had decided to follow the truck to see where it was going. The company truck, driven by Director of Network Engineering Troy Conley, with passenger Lawrence Diggs (a manager from Texas), was traveling from Mattoon to Charleston to repair a commercial cell tower.

After following Conley for about 1-½ miles, Hudson and Weaver caught up with the company truck, and Weaver passed Hudson and Conley. Without lingering, Weaver signaled, and moved safely into the right lane ahead of Conley. Hudson passed Conley soon thereafter and was momentarily parallel to Weaver's vehicle. There is no evidence that Hudson or Weaver traveled below the speed limit at any time. While Conley and Diggs testified that Hudson and Weaver may have slowed down in front of them, Conley conceded that they could have been traveling at the speed limit and was not sure if he put on his brakes. As posited by the judge, any slowdown may have been the result of reduced speed limits at an approaching stoplight or the fact that Conley, to this point, had been driving considerably *above* the posted speed limit—up to 69 miles per hour in the 45 or 55 mile-per-hour zones.

Hudson next moved into the right lane in front of Weaver to allow cars behind her to pass. Conley began to transition into the left lane to pass Hudson, but before he could do so, Hudson moved back into the left lane. The judge determined that when changing lanes, Hudson did not "cut [Conley] off" or cause him to slam on his brakes. Instead, Conley returned to the right lane and soon exited onto County Road 1200 E to take an alternative route to the jobsite. As the judge determined, in all, Hudson "prevented Conley from passing [her] by staying in the left lane, for a mile or less and not more than 1 minute." Conley did not see Hudson and Weaver after he exited Route 16.

Following these events, Conley called Sam Jurka, the employer's manager of field operations to report the incident. Conley thereafter completed an incident report,

² In the underlying decision (I did not participate), the Board had adopted the judge's finding that the employer unlawfully discharged Hudson for her strike-related conduct, finding that her actions remained protected under the Act. *Consolidated Communications*, 360 NLRB 1284 (2014). On appeal, the court agreed that Hudson's conduct was strike-related activity, 837 F.3d at 17–18, but found that the Board erroneously focused solely on an "absence of violence" when concluding that Hudson's conduct did not lose the Act's protection. *Id.* at 18. The court remanded the case to the Board to instead apply the "all of the circumstances" analysis in *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984),

enfd, 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986), to determine whether Hudson's conduct lost the protection of the Act. *Id.* at 19.

³ 837 F.3d at 18.

⁴ *Id.*

⁵ *Id.* (emphasis in original).

⁶ The employer also discharged Weaver for her part in these events. In the underlying decision, the Board found that Weaver's discharge violated Sec. 8(a)(3) and (1), 360 NLRB at 1296. The employer settled the Weaver allegation with the union. 837 F.3d at 6 fn. 1.

which the employer presented to Hudson at her termination meeting on December 17.

II.

As the District of Columbia Circuit observed, the Board's seminal decision in *Clear Pine Mouldings*, supra, establishes the legal test to be applied in determining whether an employee has engaged in "serious strike misconduct," i.e., misconduct "such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of the rights protected under the [National Labor Relations] Act."⁷ Although *Clear Pine Mouldings* involved verbal threats,⁸ the Board has applied its test to many kinds of asserted strike misconduct, including conduct involving motor vehicles. The Board's prior decisions in that area, which appropriately turn on their particular facts, do not dictate a result here. Carefully considered in light of precedent, however, the record evidence makes clear that Hudson did not engage in serious strike misconduct.

The Board has found that certain conduct involving motor vehicles did, indeed, amount to serious strike misconduct—but this case is easily distinguishable. In *International Paper Co.*,⁹ for example, a striker lost protection where he tailgated striker replacements dangerously close, weaving his car alongside them, and placing them in danger of being forced off the road or into oncoming traffic. The Board adopted the judge's finding that this driving behavior, which ultimately resulted in a criminal charge for driving to endanger, "exceed[ed] the bounds of peaceful and reasoned conduct" and had a reasonable tendency to coerce and intimidate the strike replacements. 309 NLRB at 36. Here, there is no evidence at all that the managers' truck was in any danger of being forced off the road or into oncoming traffic, and no suggestion that Hudson engaged in anything like criminal behavior.

Nor is this a case where a striker's braking created a dangerous situation for other employees.¹⁰ When Hudson changed into the left lane in front of the managers' truck, she did so with enough space that she did not cut off Conley, cause him to slam on the brakes, or otherwise risk causing an accident. And because Hudson continued at the speed limit when she was in front of Conley, there was

no impediment to the flow of traffic that could have endangered less attentive drivers behind Conley and Hudson. Hudson's driving was potentially frustrating, but it was also fleeting: she prevented Conley from passing for no more than a mile and no longer than a minute. This fact, says the majority, is "of no consequence" because "a miscalculation by anyone during that minute ... could have caused multiple fatalities or serious injuries." There is no actual evidence, however, supporting such dire speculation. Simply put, on this record, there was no even remotely close call here—and certainly nothing that would have reasonably suggested to the managers that Hudson was engaged in reckless or deliberately dangerous driving threatening them with harm, conduct that would have tended to coerce or intimidate them (as opposed to merely annoying them).

Finally, the situation here is unlike that presented in *Oneita Knitting Mills*,¹¹ a Fourth Circuit decision, issued before *Clear Pine Mouldings*, in which the court disagreed with the Board's determination that strikers had *not* lost the Act's protection. There, the Board's trial examiner (today, administrative law judge) explained that the non-striking employee, Glisson, had testified that she drove home for lunch during her 30-minute lunch break and that [two strikers] would pull their car in front of hers and not let her pass, adding, "they just crept along and they would turn around and laugh and call me scab." They also used words which, according to Glisson, a lady would not care to repeat. She did not state which of the two was the driver. There was never any physical contact between the cars and Glisson was unable to state whether other cars were in the area.

Oneita Knitting Mills, Inc., 153 NLRB 51, 62 (1965). Reversing the Board, the Fourth Circuit determined that the two strikers "repeatedly drove their car in front of [the nonstriker's] car and would not permit her to pass, and that [the strikers] shouted obscene remarks and called her a 'scab.'"¹² The court concluded, as a matter of law, "that this misconduct ... was calculated to intimidate the non-strikers and ... was inherently dangerous in that it involved obstruction of the public highway."¹³ Here, in contrast, Hudson did not "repeatedly" drive her car in front of

⁷ 268 NLRB at 1045–1046.

⁸ The *Clear Pine Mouldings* Board rejected what it characterized as the Board's prior "per se rule that words alone can never warrant [loss of statutory protection] in the absence of physical acts." *Id.* at 1046.

⁹ 309 NLRB 31, 36 (1992), *enfd.* sub nom. *Local 14, United Paperworkers International Union v. NLRB*, 4 F.3d 982 (1st Cir. 1993). The District of Columbia Circuit here cited *International Paper* as illustrative of "misconduct committed on a high-speed public roadway with third-party vehicles present." 837 F.3d at 18.

¹⁰ See *Teamsters Local 812 (Pepsi-Cola Newburgh Bottling Co.)*, 304 NLRB 111, 117 (1991) (finding that a union violated Sec. 8(b)(1)(A)

when a striker repeatedly braked in front of a non-striker in a manner that almost caused an accident); *PRC Recording Co.*, 280 NLRB 615, 663–664 (1986) (finding serious misconduct where a striker passed two non-striker vehicles and, while in front of them, applied his brakes and zig-zagged, forcing one vehicle to swerve into the median) *enfd.* 836 F.2d 289 (7th Cir. 1987).

¹¹ *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385 (4th Cir. 1967). The District of Columbia Circuit here cited *Oneita Knitting* as illustrative. 837 F.3d at 18.

¹² *Id.* at 392.

¹³ *Id.*

the managers' truck, and she shouted no obscenities or insults. Nor can she fairly be said to have engaged in "obstruction of the public highway." Unlike the *Oneita Knitting* strikers, Hudson did not "creep along" (in the non-striker's phrase): she drove at the speed limit. The majority insists that Hudson "was intentionally using her vehicle to obstruct or impede [the managers'] passage"—but this would be meaningfully true only if the managers had some legitimate need to exceed the speed limit.

Against the weight of the record evidence, then, the majority insists that Hudson's driving was "calculated to intimidate"—a baseless conclusion that the administrative law judge, who saw and heard the witnesses in this case, most certainly did not draw. Rather, this case fits comfortably with prior Board decisions finding that striker conduct involving motor vehicles did *not* lose the Act's protection.¹⁴ Had Hudson cut off the managers' truck, had she persisted in driving in front of them for longer than she did, had she violated traffic laws, had her driving been accompanied by threatening words or gestures, had road conditions been hazardous, had she had prior hostile encounters with the managers—add some or all of these circumstances, and this would be a different, more difficult case. But these factors are missing from the record, and citing alarming statistics about roadways death (as the

majority does) is no proper substitute for analyzing the evidence with care, as we are required to do.

In *Clear Pine Mouldings*, the Board rejected an earlier per se rule that strikers' verbal threats could never be serious strike misconduct. In this case, the District of Columbia Circuit similarly rejected the Board's original suggestion that the absence of "violence" was the single dispositive factor here. Now, ironically, the majority seemingly makes the same sort of error—focusing on the "inherent danger" of highway driving to the practical exclusion of the other circumstances present.

Hudson's driving incident may not have been admirable, or even advisable, but considering "all the circumstances"—as the Court of Appeals has instructed us to do—the General Counsel proved that it was not misconduct severe enough to cost Hudson the protection of the Act and so her job. Because substantial evidence simply does not support the majority's contrary conclusion, I dissent.

Dated, Washington, D.C. October 2, 2018

Lauren McFerran,

Member

NATIONAL LABOR RELATIONS BOARD

¹⁴ For example, in *Batesville Casket Co.*, 303 NLRB 578, 580–581 (1991), the Board adopted the judge's finding that a striker did not engage in serious misconduct when he pulled up alongside a company van at a stop light, deliberately pulled in front of it, and continued in this position for a short distance until the van detoured to avoid him. Acknowledging that vehicles might be used in some situations by strikers to intimidate non-strikers, the judge looked to the context in which the incident occurred and found that the incident was very short in duration, the striker did not impede the progress of the van, and there was no evidence that he or other strikers operated their vehicles "in any reckless, unsafe, or threatening manner so as to conclude that their actions reasonably tended to intimidate or coerce any nonstrikers." *Id.* at 581, citing *AIM Grand Hotel*, 275 NLRB 1015 (1985).

Similarly, the Board found that strikers did not lose the protection of the Act where, in the course of strike activity, they followed another driver, see *Altorfer Machinery Co.*, 332 NLRB 130, 142–143 (2000), or pulled up alongside a car at a high rate of speed and motioned for the nonstriker to pull over, *Gibraltar Sprocket Co.*, 241 NLRB 501, 502 (1979). *Gibraltar Sprocket* pre-dates *Clear Pine Mouldings*, but the Board applied a standard that aligns closely with the present standard—explaining that "each incident of alleged misconduct must be assessed in light of the surrounding circumstances, including the severity and frequency of the involved employee's actions," 241 NLRB at 501–502—and so the case remains instructive.